

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1268

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AND AS
EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI,
DECEASED, ET AL., PETITIONERS

v.

REPUBLIC OF SUDAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in the oral argument in this case as amicus curiae supporting petitioners and that the United States be allowed ten minutes of argument time. Petitioners have consented to the allocation of ten minutes of their argument time to the United States.

This case concerns the proper interpretation of the "[t]errorism exception" to foreign sovereign immunity in 28 U.S.C.

1605A, which is part of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 et seq. The terrorism exception provides that a foreign state that has been designated a state sponsor of terrorism is not immune from jurisdiction of U.S. courts in certain civil actions for damages arising out of personal injury or death "caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act" by a state official, employee, or agent acting within the scope of his office, employment, or agency. 28 U.S.C. 1605A(a)(1) (emphasis omitted).

In 2008, Congress amended the FSIA to authorize certain plaintiffs to pursue a federal cause of action "for personal injury or death" caused by extrajudicial killing and to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c); see National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Congress also moved the terrorism exception to foreign sovereign immunity from 28 U.S.C. 1605(a)(7), where it was subject to the prohibition on punitive damages in 28 U.S.C. 1606, to Section 1605A(a), where it is not so limited. In addition, Congress provided that certain existing claims "shall * * * be given effect as if the action had originally been filed under section 1605A(c)," NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note), and that new claims "arising out of the

same act or incident" as existing claims "may be brought under section 1605A," § 1083(c)(3), 122 Stat. 343. The question presented in this case is whether the 2008 amendments permit recovery of punitive damages from foreign state sponsors of terrorism for activities occurring prior to enactment of Section 1605A.

The United States has filed a brief as amicus curiae supporting petitioners, arguing that the current version of the terrorism exception, 28 U.S.C. 1605A, permits recovery of punitive damages from foreign state sponsors of terrorism for conduct predating the provision's enactment in 2008. The United States argues that while this Court's analysis in Landgraf v. USI Film Products, 511 U.S. 244 (1994), applies to the question whether plaintiffs relying on the new federal cause of action in 28 U.S.C. 1605A(c) may recover punitive damages for conduct predating the 2008 NDAA, Congress expressly provided that such plaintiffs may do so. In particular, Congress provided for certain claims based on pre-enactment conduct to "be given effect as if the action had originally been filed under section 1605A(c)," and for other such claims to be filed directly "under section 1605A." NDAA § 1083(c)(2)-(3), 122 Stat. 342-343. The United States further argues that plaintiffs who invoke the terrorism exception to foreign sovereign immunity in Section 1605A(a) to bring state or foreign causes of action also may recover punitive damages for

pre-enactment conduct, because Congress in the 2008 amendments moved the terrorism exception from Section 1605(a)(7), where it was subject to Section 1606's prohibition on the recovery of punitive damages, to Section 1605A(a), where it is not. The United States argues that because that change does not create or modify any cause of action -- but instead affects the extent to which United States courts are open to preexisting state or foreign causes of action -- the Landgraf presumption against retroactivity does not apply.

The United States has a substantial interest in the resolution of this case. Litigation against foreign states in United States courts can have significant foreign affairs implications for the United States. At the same time, the United States has a strong interest in opposing state-sponsored terrorism, and in supporting appropriate recoveries for victims. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

The United States has participated in oral argument as amicus curiae in prior cases involving interpretation of the FSIA. E.g., Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019); Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018); Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017); OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015); Republic of Argentina v. NML Capital, Ltd., 134 S. Ct.

2250 (2014); Samantar v. Yousuf, 560 U.S. 305 (2010). The United States' participation in oral argument is therefore likely to be of material assistance to the Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

NOVEMBER 2019